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No. 00-1464

In The

Supreme Court of the United States

PHELPS DODGE CORPORATION and
ARIZONA PUBLIC SERVICE COMPANY,

Petitioners,

versus

THE UNITED STATES, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The Supreme Court
Of The State Of Arizona**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondent Salt River Valley Water Users' Association ("SRVWUA") discloses that it is a private corporation organized under the laws of the State of Arizona and there is no parent corporation or publicly held company owning ten percent or more of SRVWUA's stock.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of the State of Arizona (App. A to the petition) is reported as *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 9 P.3d 1069 (Ariz. 2000) (sometimes referred to herein as *"Gila River IV"* in order to distinguish it from cases cited in the decision below and in this brief as *Gila River I*,[1] *Gila River II*[2] and *Gila River III*[3]). The opinion below affirmed an unreported order of the Maricopa County Superior Court of the State of Arizona (Pet. App. B).[4]

JURISDICTION

The petition cites 28 U.S.C. § 1257(a) as the basis for the Court's jurisdiction. As discussed *infra* at pages 5-13, the Court does not have jurisdiction because the decision below is interlocutory and does not constitute a final judgment within the meaning of 28 U.S.C. § 1257(a). The Court should deny review on the additional procedural

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[1] *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 830 P.2d 442 (Ariz. 1992).

[2] *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 857 P.2d 1236 (Ariz. 1993).

[3] *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999), *cert. denied*, 530 U.S. 1250 (2000).

[4] Counsel for these respondents served as lead counsel in the Arizona Supreme Court for all parties supporting the trial court's order.

basis that the issues are not ripe for review. *See infra* at 13-20.

FACTUAL AND PROCEDURAL BACKGROUND

The petition challenges portions of the most recent interlocutory decision issued by the Arizona Supreme Court in an ongoing general stream adjudication of the Gila River system in the state.[5] The decision below also applies in the Little Colorado River watershed, which is the subject of a similar general stream adjudication pending in Arizona. The purpose of the two adjudications is to determine "the nature, extent and relative priority" of rights to use the waters of the particular "river system and source." Arizona Revised Statutes ("A.R.S.") §§ 45-251(2), 45-252(a).

The waters included in each "river system and source" at issue in the pending adjudications in Arizona are "all water appropriable under [A.R.S.] § 45-141 and all water subject to claims based upon federal law." A.R.S. § 45-251. Under Arizona law, appropriable water is limited to surface water – defined by statute as including water flowing in definite underground channels – and a judicially defined category of underground water known as "subflow." *See* A.R.S. § 45-141; *Gila River II*, 857 P.2d at 1240-1241; *Maricopa County Municipal Water Conservation District No. One v. Southwest Cotton Co.*, 4 P.2d 369, 380-381 (Ariz. 1931) (*"Southwest Cotton"*). Appropriable water – "surface" water and "subflow" – is governed by

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[5] The Gila River adjudication encompasses the watersheds of the Salt, Verde, Gila, Agua Fria, Santa Cruz and San Pedro rivers in Arizona.

the doctrine of prior appropriation. *Gila River IV*, 9 P.3d at 1073, ¶¶3, 5; *Gila River II*, 857 P.2d at 1241.[6]

Underground water in Arizona not flowing in a definite underground channel and not constituting subflow is known as "groundwater" or "percolating groundwater." *Gila River II*, 857 P.2d at 1240. It "is excluded from the legal rules applying to prior appropriation," *id.*, and therefore is not subject to a priority scheme under Arizona law. Instead, groundwater subject to Arizona law is governed by the doctrine of reasonable use or by the Groundwater Code, A.R.S. § 45-401 *et seq. Gila River IV*, 9 P.3d at 1073, ¶3.[7]

In view of Arizona's bifurcated system of water rights and the limited scope of general stream adjudications under A.R.S. § 45-252(a), the adjudication court must determine the extent to which water pumped from wells is appropriable under A.R.S. § 45-141. *Gila River II*, 857 P.2d at 1240. Initially, the trial court developed a test based upon the volume of stream depletion during a specified period of pumping. *Id.* at 1241. The Arizona Supreme Court accepted interlocutory review and, after

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[6] Under the doctrine of prior appropriation, "the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. 'First in time, first in right' is the short hand expression of this legal principle." *Arizona v. California*, 373 U.S. 546, 555 (1963).

[7] "The doctrine of reasonable use permits an overlying landowner to capture as much groundwater as can reasonably be used upon the overlying land and relieves the landowner from liability for a resulting diminution of another landowner's water supply." *Gila River III*, 989 P.2d at 743 n.3 (citing *Bristor v. Cheatham*, 255 P.2d 173, 180 (Ariz. 1953)).

reaffirming the holding in *Southwest Cotton* that subflow is appropriable water, rejected the trial court's test as being contrary to Arizona law. *Id.* at 1239, 1243-1246. The state supreme court remanded the case to the trial court to "take evidence and, by applying the principles contained in [the *Gila River II*] opinion, determine the criteria for separating appropriable subflow from percolating groundwater." *Id.* at 1248.

On remand, the trial court "held a ten-day evidentiary hearing, during which ten experts in the fields of geology and hydrology testified." *Gila River IV*, 9 P.3d at 1075, ¶13. The trial court also conducted a field trip, with experts and counsel, to one of the river basins. *Id.* After considering the evidence and briefs, the trial court issued a lengthy ruling in which it concluded that the saturated floodplain Holocene alluvium is the subflow zone. *Id.*, 9 P.3d at 1073, ¶2, 1075-1076, ¶¶14, 16-18. The trial court also ruled that a well outside the subflow zone may be subject to the adjudication if its cone of depression reaches the subflow zone and will affect the quantity of stream flow. 9 P.3d at 1081-1082, ¶¶38-40.

In *Gila River IV*, the Arizona Supreme Court affirmed "in its entirety" the subflow order entered by the trial court on remand. 9 P.3d at 1073, ¶2, 1083, ¶48. The supreme court concluded that the trial court's order is consistent with previous Arizona cases and does not amount to a taking of private property. 9 P.3d at 1078-1081, 1083.

SUMMARY OF ARGUMENT

The petition must be denied because the decision below does not qualify as a final judgment under 28 U.S.C. § 1257(a) and is not ripe for review. Even if the

petition were not premature, review would not be warranted because the Arizona Supreme Court reached the correct result and has not effected a taking of any property interest petitioners may have.

ARGUMENT

I. THE COURT LACKS JURISDICTION BECAUSE THE DECISION BELOW IS NOT A FINAL JUDGMENT

Under 28 U.S.C. § 1257(a), which is the only jurisdictional basis cited in the petition, review by the Court of state court decisions is expressly limited to "*[f]inal* judgments or decrees" (emphasis added). To be reviewable by the Court, a state-court judgment must be an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997).

Gila River IV is not a final judgment or decree. It is an interlocutory ruling and does not terminate the litigation, which is an ongoing water rights adjudication. It does not even dispose of all remaining issues of federal law. Although substantial progress has been made in resolving preliminary issues, no water rights have been adjudicated to a conclusion in the pending litigation except for a few court-approved settlements, and extensive proceedings remain to be completed in both the Arizona Supreme Court and the Superior Court. As part of the pending case, the Arizona Supreme Court is preparing its ruling in an interlocutory appeal of a federal question involving quantifying federal reserved rights.[8] As the trial court

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[8] Briefing and oral argument in the Arizona Supreme Court have been completed on the following issue: "What is the

moves forward with the adjudication process, its many tasks will include making factual findings based upon *Gila River IV*, adjudicating federal reserved rights by applying *Gila River III*, and determining the applicable quantification standards for federal reserved rights. All of the trial court's conclusions will be subject to appellate review by the Arizona Supreme Court. The federal questions will eventually be subject to review by this Court. *See Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983).

Gila River IV is not even determinative of the respective rights of petitioners and other competing claimants to water that may be accessible to petitioners' wells. The principles and criteria recognized by the Arizona Supreme Court will be applied to specific wells during future proceedings. A determination of the effect, if any, that application of *Gila River IV* will have on pumping by petitioners must await the outcome of factual development in the state courts. Arizona courts have not purported to determine that any particular well is pumping subflow or is subject to the adjudication, much less that a specific well is wrongfully interfering with appropriative rights or federal reserved rights and must curtail its pumping. *Gila River IV* contemplates that such determinations will be made during future proceedings on remand.

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appropriate standard to be applied in determining the amount of water reserved for federal lands?" *See Gila River III*, 989 P.2d at 742 n.2; Pet. App. D2. Future proceedings in Arizona courts will determine the extent, if any, to which specific supplies of groundwater, including those underlying petitioners' lands, are subject to federal reserved rights. *See Gila River III*, 989 P.2d at 748, ¶31.

It provides guidance to the trial court on how to determine whether particular wells are subject to the adjudication, including how to determine and map, with the technical assistance of the Arizona Department of Water Resources ("ADWR"), the location of the subflow zone along each river or other watercourse encompassed by the adjudication. *See Gila River IV*, 9 P.3d at 1081, ¶34, 1083, ¶48.

Similarly, it remains to be seen whether – and, if so, how – petitioners and other landowners will be affected by the statement in *Gila River IV* that "landowners have 'no legally recognized property right in potential, future groundwater use.' " 9 P.3d at 1083, ¶47 (quoting *Gila River I*, 830 P.2d at 451). Petitioners have not alleged or shown that the statement has been used to curtail pumping by existing wells or to preclude drilling of new wells. In its response supporting the petition, ASARCO Incorporated repeatedly recognizes that whether the quoted statement constitutes a taking depends in part upon how it is interpreted and applied by Arizona courts in future proceedings. *See* ASARCO Response at 2, 7 and 11 (an alleged taking depends upon whether the Arizona Supreme Court's statement is "taken literally" or "read literally") and at 11, 13 (the statement "appears" to constitute a taking).

Denying the petition as being premature will serve the purposes underlying the finality requirement in 28 U.S.C. § 1257(a), which include avoiding piecemeal review of state court judgments, refusing to give advisory opinions, and minimizing federal intrusion into state affairs. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973). Just last Term, in case numbers 99-1388 and 99-1389, the Court refused

to review the interlocutory ruling by the Arizona Supreme Court in *Gila River III* that federal reserved rights extend to groundwater. *See* 530 U.S. 1250 (2000). In urging the Court to deny the certiorari petitions in 99-1388 and 99-1389 on the ground that *Gila River III* is not a final judgment, the United States acknowledged that the petitioners will be entitled to seek review of *Gila River III* when the adjudications reach an end in state court, if the questions presented in 99-1388 and 99-1389 have not become moot in the interim. Brief in Opposition at 9. There is considerable overlap between the present petition and number 99-1388.[9] By denying immediate review of the pending certiorari petition, the Court will promote judicial economy and avoid fragmentary review of federal questions resolved by the state courts in a series of interlocutory opinions.

Deferring any consideration of petitioners' challenges would also be consistent with the Court's sound policy against issuing advisory opinions. Whether and how pumping by petitioners will be curtailed or otherwise affected as a result of the opinion in *Gila River IV* is not known at this time. The potential impact on petitioners and other parties is contingent upon determinations not yet made by Arizona courts. The Superior Court has not begun the process of determining and mapping the lateral boundaries of the subflow zone along each watercourse. A related task will be determining which

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[9] The parties are the same, the present petitioners were petitioners in 99-1388, and both petitions challenge decisions by the Arizona Supreme Court that provide guidance for determining which wells are subject to the adjudication and the nature and scope of rights and limitations associated with pumping by those wells.

wells located within those boundaries are not pumping subflow.[10] The quantities and priority dates of appropriative rights must also be established. The existence, scope and priority dates of any federal reserved rights to groundwater will also be determined in future proceedings in the adjudication.[11] The state court must also determine the extent to which groundwater pumping unlawfully interferes with federal reserved rights to surface water or groundwater.[12] Finally, the state court may be asked to determine the consequences and remedies for a well owner who is found to be pumping appropriable water.[13] Until all of these determinations are made, petitioners' assertion that the decision below will result in enjoining their pumping of groundwater is speculative.

Refusing to consider petitioners' challenges at this time would also avoid a risk of precipitating unnecessary interference with state courts. Future progress in the state courts may moot or modify petitioners' arguments. At the very least, deferring any review of *Gila River IV* until the end of the adjudication will enable the Court to limit its examination to federal questions presented in the context of the actual impact on the parties, after allowing the trial

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[10] Not all wells within the saturated floodplain Holocene alluvium pump subflow. *See Gila River IV*, 9 P.3d at 1077, ¶18 (any well whose perforations are below an impervious layer precluding drawdown from the floodplain alluvium will be treated as being outside the subflow zone).

[11] *See Gila River III*, 989 P.2d at 748-749, ¶¶31-32.

[12] *See id.*, 989 P.2d at 749-751.

[13] Issues relating to consequences and remedies could include whether to excuse noncompliance with statutory requirements and assign a priority date based upon when the well was drilled.

court and the Arizona Supreme Court to make final decisions on the parties' respective rights.

The pending petition does not fit within any of the exceptional circumstances in which the Court has found finality under 28 U.S.C. § 1257(a) despite future proceedings in state court. Four such situations were identified in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975):

> (1) cases that are "for all practical purposes concluded" because "the federal issue is conclusive or the outcome of further proceedings preordained"; (2) cases in which "the federal issue . . . will survive and require decision regardless of the outcome of future state court proceedings"; (3) cases in which "later review of the federal issue cannot be had, whatever the ultimate outcome of the case"; and (4) cases "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" *and* "a refusal immediately to review the state court decision might seriously erode federal policy". *Id.* at 479-483 (emphasis added).

"In most, if not all, of the cases in these categories, these additional [state court] proceedings *would not require the decision of other federal questions* that might also require review by the Court at a later date." *Id.* at 477 (emphasis added). In those cases there was "no probability of piecemeal review with respect to federal issues." *Flynt v. Ohio*, 451 U.S. 619, 621 (1981). Here, it is likely that at a future date the important federal reserved rights questions that the Court refused to review last year in 99-1388 and 99-1389, and the federal question regarding the quantification standard that is now pending before the Arizona Supreme Court, will be brought to this Court.

With respect to the first category recognized in *Cox Broadcasting*, many issues of federal and state law will survive the final resolution of the federal questions posed by the pending petition, the adjudication is not "for all practical purposes concluded" (420 U.S. at 479), and the outcome of further proceedings is not preordained. As discussed above, numerous other findings and rulings yet to be made will affect the determination of the parties' water rights and the impact, if any, that *Gila River IV* may have on petitioners.

The pending petition also falls outside the second *Cox Broadcasting* category, which does not encompass eminent domain cases. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127 (1945). *Radio Station WOW* held that a judgment directing immediate delivery of property used as a federally licensed radio station was reviewable by the Court and was to be deemed disassociated from a future accounting because the judgment requiring the transfer was "independent of, and unaffected by," the accounting. *Id.* at 126. The present case is not remotely similar; future proceedings in state court will determine the extent, if any, to which pumping by petitioners interferes with appropriative rights or federal reserved rights and is affected by applying *Gila River IV*. Those future determinations will be directly relevant to issues inherent in petitioners' taking claim.[14]

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[14] In our reply memorandum supporting our certiorari petition in 99-1389, we argued that the Arizona Supreme Court's federal reserved rights ruling in *Gila River III* is "final" within the meaning of 28 U.S.C. § 1257(a). We relied primarily upon the second category in *Cox Broadcasting*. The facts and policies applicable to a consideration of the finality issue presented by the pending petition are substantially different. In

Moreover, *Cox Broadcasting* explained that the first two categories are limited to cases where "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." 420 U.S. at 478. For the reasons explained above, the future proceedings in the Gila River adjudication, including application of *Gila River IV*, will have great importance in determining whether any state law restrictions impact petitioners' pumping of groundwater. A related factor favoring denial of the petition at this juncture is that under the present record petitioners' constitutional claims are presented in an abstract form, with uncertainty regarding the water rights that will be decreed by the state court and the extent to which the decision below will impact petitioners' future pumping of groundwater, whereas further proceedings are likely to ultimately tender any taking issues to this Court in clean-cut and concrete form with a developed record. *See Minnick v. California Dept. of Corrections*, 452 U.S. 105, 123 (1981).

Unlike the third *Cox Broadcasting* category, this is not a situation in which review of petitioners' challenges "cannot be had" at the conclusion of the state court proceedings. 420 U.S. at 481. This case also fails to meet either of the two conditions of the fourth category recognized in *Cox Broadcasting*. *Even if* the decision below had effected a taking, it would be necessary to adjudicate

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any event, the Court denied the certiorari petitions in 99-1388 and 99-1399, and although the Court gave no reason for its denial, perhaps it agreed with the assertion of the United States and other respondents that the decision in *Gila River III* is not final.

rights under federal and state law to underground water accessible to petitioners' wells. Deferring review will promote federal policies recognized in *Snyder's Drug Stores* while preserving petitioners' right to bring the issues to this Court at a later date. Continuation of the Gila River adjudication in the interim will not undermine "identifiable federal statutory or constitutional policies". *Flynt*, 451 U.S. at 622.

For these reasons, the Court lacks jurisdiction over the issues presented by the petition. The petition is premature.[15]

II. PETITIONERS' CLAIMS ARE NOT RIPE FOR REVIEW

In addition to lacking finality, the decision below is not ripe for review by this Court. Petitioners appear to concede that the Arizona Supreme Court did not facially effect a taking of their alleged property interests.[16] As

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[15] We recognize that certain other interlocutory rulings by the Arizona Supreme Court on federal issues presented in the adjudication may qualify for immediate review. For instance, if the Arizona Supreme Court rules that practicably irrigable acreage is the exclusive standard for quantifying federal reserved rights for Indian lands (*see supra* note 8), such an important decision may not suffer the defects in finality and ripeness – such as factual uncertainties regarding how the lower court's decision will be applied – that preclude immediate review of *Gila River IV*.

[16] This section of our brief assumes, for purposes of argument, that petitioners have a protected property interest in groundwater that has not been pumped. That assumption is refuted in the following section of this brief, which shows that the Arizona Supreme Court was correct in stating that well owners do not own underground water and have no legally recognized property right in potential, future groundwater use.

petitioners acknowledge, answering the question of whether a taking has occurred requires a factual inquiry. Petition at 26. "Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986). "[N]o answer" to the question of whether a taking has occurred "is possible until a court knows what use, if any, may be made of the affected property." *Id.* at 350.

The petition is the equivalent of a motion for summary judgment, asking the Court to hold that as a matter of law an inevitable result of the decision of the Arizona Supreme Court will be to preclude petitioners and other landowners from pumping any groundwater, which in turn will allegedly render their land valueless. The petition baldly asserts that *Gila River IV* "has destroyed the reasonable investment-backed expectations of millions of Arizonans," that "appropriators now will be able to enjoin groundwater pumping from thousands of wells," that groundwater users "will be left without recourse," and that the wells owners "will be denied *any* economically beneficial or productive use of their land". Petition at 27 (emphasis in original). At best, all of these assertions by petitioners are speculative and unsupported by the record.

"[T]he issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999). Here, the opinion of the Arizona Supreme Court does not purport to enjoin pumping by petitioners or others. There

is no indication in the record that pumping by petitioners' wells has been or will be curtailed as a result of *Gila River IV*. The potential for such a limitation is contingent upon numerous determinations yet to be made by the state courts and at this time is merely speculative. As explained in the preceding section of this brief, the impact that *Gila River IV* may have on pumping by petitioners' wells is uncertain until the state courts apply the criteria and principles affirmed by the Arizona Supreme Court in *Gila River IV*, adjudicate all appropriative and federal reserved rights that may be affected by such pumping, and decide whether to decree that owners of wells have appropriative rights to subflow pumped by their wells.[17]

The factual issues inherent in the portion of *Gila River IV* relating to cones of depression illustrate the unripe posture of petitioners' assertions. The adjudication court has not yet adopted a test for determining a well's cone of depression. *Gila River IV*, 9 P.3d at 1082, ¶39. "[E]ach well must be separately evaluated" to compute drawdown at the subflow zone. *Id.* Only the portion of each well's production that depletes streamflow constitutes appropriable water. *Id.*, ¶40. Until the Superior Court

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[17] For instance, under *Gila River III* and *Gila River IV* the state court must delineate the boundaries of the subflow zone along each watercourse, determine which wells owned by petitioners are located within those boundaries and are drawing subflow, establish the quantities and priority dates of all appropriative and federal reserved rights to the subflow and of all federal reserved rights to the common supply of groundwater, determine which wells are interfering with federal reserved rights, and find the extent to which cones of depression of wells located outside the subflow zone extend into the subflow zone and are depleting streamflow.

maps the subflow zones, performs the cone of depression analysis for each well, and makes associated findings, the extent to which wells owned by petitioners or others are pumping subflow is unknown.

Further, petitioners have made no attempt to show the extent to which they would be entitled to pump in the absence of *Gila River IV*. Any restrictions attributable to applying *Gila River IV* may be duplicated or exceeded in many instances by application of the doctrine of federal reserved rights as interpreted by the Arizona Supreme Court in *Gila River III*. Under *Gila River III*, federal reserved rights "extend to groundwater to the extent groundwater is necessary to accomplish the purpose of the federal reservation." 989 P.2d at 751, ¶43. Therefore, a finding that an aquifer tapped by petitioners' wells is subject to a federal reserved right could result in limiting petitioners' pumping, without regard to *Gila River IV*. *Gila River III* also held that federal law is more restrictive than Arizona law in protecting against pumping that interferes with water rights of others:

> Holders of federal reserved rights [to appropriable water or groundwater] enjoy greater protection from groundwater pumping than do holders of state law rights to the extent that greater protection may be necessary to maintain sufficient water to accomplish the purpose of a reservation.

989 P.2d at 751, ¶43.[18] Any state law restrictions on pumping by petitioners' wells cannot constitute a taking

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[18] The record provides no basis for assuming that continued pumping by petitioners will not be subject to the doctrine of federal reserved rights. Just last year, petitioners acknowledged in 99-1388 that the ruling in *Gila River III* "is of vital importance to the vast majority of the citizens of Arizona

if they are duplicated or exceeded by valid limitations imposed by federal law. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-1030 (1992) (no taking occurs if "the proscribed use interests . . . inhere in the [owner's] title itself" or in the "background principles" of the law of property).[19]

Due in part to the uncertainty at this time about the extent to which pumping by petitioners violates state law but not federal law, there is also uncertainty about the relief that might be awarded against petitioners. It is not a foregone conclusion that every well pumping in violation of state law will be enjoined. Depending upon the circumstances, relief might be limited to payment of damages or providing a substitute quantity of water. Petitioners may also be able to mitigate or eliminate their interference by shifting production to other wells or otherwise altering their pumping patterns or their land use.

Until the adjudication court determines specific instances in which pumping by petitioners complies with federal law but interferes with appropriative rights, and selects remedies for any violations of state law, it cannot

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who are dependent, in whole or in part, on groundwater". Petition in 99-1388 at 23. Petitioners explained that "dozens of large federal reservations [are] located throughout the state," and the groundwater basins "are a common resource . . . shared by both federal and non-federal claimants." *Id.*

[19] In *Gila River III*, the Arizona Supreme Court "reject[ed] as premature the argument of the Arizona Tribes that we should immediately enjoin pumping that is depleting water beneath reservations. Until federal rights are quantified, it cannot be determined which if any of the tribes are entitled to such relief." 989 P.2d at 749 n.12. Likewise, it would be premature for this Court to make any conclusions about the extent if any to which pumpers will be enjoined under *state* law.

be determined whether *Gila River IV* precludes petitioners from making any economically beneficial or productive use of their land. Petitioners acknowledge that an analysis of the potential impact of *Gila River IV* on their pumping necessitates a factual inquiry. Petition at 26. The present record provides no basis for this Court to determine how *Gila River IV* will affect petitioners' wells and the value of their land.

Petitioners' challenge to the statement in *Gila River IV* that landowners have no property right in potential future groundwater use lacks ripeness for an additional reason. Petitioners and ASARCO erroneously suggest that the court's statement eliminates their alleged rights under the Groundwater Code. *Gila River IV* does not interpret or apply, much less strike down, any provision of the Groundwater Code. The court expressly acknowledged that its decision does not change the legal status of underground water that is not appropriable. 9 P.3d at 1083, ¶45. Well owners are free to continue to pump groundwater in compliance with the requirements of the Groundwater Code so long as they do not interfere with federal reserved rights or appropriative rights. Unless and until the Arizona Supreme Court addresses whether and how *Gila River IV* affects any rights under the Groundwater Code, the supposition by petitioners and ASARCO that *Gila River IV* implicitly vitiates portions of the Code is not ripe for review by this Court.

The policy considerations that support the finality requirement also counsel against reviewing taking claims that are presented in the abstract and are based upon speculative assumptions, without a developed record. In the absence of any proof that *Gila River IV* will lead to an

injunction or damage award against petitioners, the petition is seeking an advisory opinion addressing all of the scenarios that may develop during additional proceedings in state court. Immediate review would also pose a risk of unnecessarily deciding a constitutional issue. As the record is developed in state court, the issues may become moot or changed. If the Court intervenes now, it may prematurely intrude into the state court litigation and create the prospect of piecemeal review; a decision by this Court that a taking may have occurred would have to be held in suspension until the adjudication is concluded and petitioners create a record showing the extent to which *Gila River IV* alone impacts their pumping and their ability to derive economic benefit from their land.

The Court has consistently held that a claim that the application of government regulations effects a taking of a property interest "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). Until there is a final decision at the state level that enables the Court to "conclusively determine whether [the landowner] will be denied all reasonable beneficial use of its property," the taking claim is not ripe. *Id.* at 194. As in *Williamson* and similar cases, including *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981) and *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981), petitioners' alleged taking claim is premature until the

additional state court proceedings run their course and the impact of *Gila River IV* on pumping by petitioners' wells becomes clear.

Robinson v. Ariyoshi, 887 F.2d 215 (9th Cir. 1989) is instructive. Property owners alleged that the Hawaii Supreme Court had taken their vested water rights in a decision that addressed "the existence of riparian rights, the limit on the right to divert water" and "the State's ownership of the waters." *Id.* at 218. Pursuant to instructions from this Court to consider the effect of *Williamson*, the Ninth Circuit Court of Appeals concluded that "this case does not pose a ripe controversy" and remanded "with instructions to dismiss the complaints." *Id.* at 216. The Ninth Circuit explained that "we cannot say at this point" that the landowners retained no reasonable beneficial use of their property or that their expectation interests had been completely destroyed. *Id.* at 219.

> To date, the State has not interfered in any way with the parties' use or diversions of the waters. . . . [E]ven if the State of Hawaii has placed a cloud on the title of the various private owners, this inchoate and speculative cloud is insufficient to make this controversy ripe for review. *Id.*

III. THE OPINION BELOW IS NOT A JUDICIAL TAKING AND DOES NOT WARRANT REVIEW BY THIS COURT

Even in the absence of the jurisdictional obstacles discussed above, review by this Court would not be warranted. The Arizona Supreme Court's decision is correct and does not effect a taking of petitioners' property.

A. The Subflow Test Approved by the Opinion Below Is Not a Sudden and Unpredictable Change in State Law

There is no basis for petitioners' assertion that *Gila River IV* constitutes a sudden and unpredictable change in Arizona law regarding subflow and percolating groundwater. Petitioners' argument was expressly rejected by the Arizona Supreme Court, which explained that the trial court's findings and conclusions regarding subflow are consistent with the fundamental principles established by previous Arizona cases addressing the subject. 9 P.3d at 1080, ¶32. *Gila River II* specifically refused to overrule or revise *Southwest Cotton* but acknowledged the necessity for "interpreting" the earlier case in order to "resolve as best we can the ambiguities and uncertainties left by that decision." 857 P.2d at 1243. *Gila River IV* determined that the trial court had properly applied on remand "the more general criteria set forth in *Gila River II*." 9 P.3d at 1080-1081, ¶33.[20]

In accordance with principles of comity and federalism, this Court should defer to the Arizona Supreme Court's interpretation of state law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("state courts are the ultimate expositors of state law" and the Supreme Court is "bound by their

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[20] Petitioners' taking argument was also rejected by the Arizona Supreme Court in 1993. In clarifying *Southwest Cotton*, adopting more specific criteria for distinguishing subflow from groundwater, and remanding to the Superior Court to apply the refined principles, *Gila River II* "implicitly rejected" petitioners' argument that application of those criteria and principles will constitute a taking of their property. *Gila River IV*, 9 P.3d at 1083, ¶¶45, 47.

constructions except in extreme circumstances"). Deference to the state court is particularly compelling in the arena of state water law, which has consistently been recognized as being the province of the states to develop and apply,[21] and in which public policy considerations – such as preserving flowing streams in an arid climate – play a central role.[22]

In any event, the decision below correctly rejected petitioners' assertion because it marked at most only an incremental and reasoned development of Arizona precedent as part of the evolutionary process of distinguishing subflow from percolating groundwater. Even if petitioners had a vested property right to pump groundwater, *Gila River IV* falls far short of the type of radical and unpredictable departure from previous decisions that might support a claim for a judicial taking.

Contrary to petitioners' contention that the subflow zone approved in *Gila River IV* is too wide, no Arizona case has stated that the lateral boundaries of the subflow zone must be within a particular distance from the stream bed. *Southwest Cotton* expressly recognized that a subflow zone may be at least several miles wide and that the entirety of such an area is considered to be "within, or

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[21] *See California v. United States*, 438 U.S. 645, 653 (1978) (federal water policy has reflected "purposeful and continued deference to state water law").

[22] Nearly a century ago, Justice Oliver Wendell Holmes observed that "few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908).

immediately adjacent to, the bed of the surface stream."[23] The court used the term "immediately adjacent" in a relative sense to designate a relatively narrow band along the stream in comparison to the breadth of the entire basin, which typically is tens of miles wide.[24] Portions of the San Pedro River valley, which was the focus of the evidentiary hearing in the trial court in the present case, are 15-20 miles wide, Pet. App. B11, whereas the floodplain alluvium "is found only in the center" of that valley (*id.*) and generally its outer boundary is within one mile of the stream. *See id.*; Fig. 8 to Ex. 1 (report of expert Jon Ford); Ex. 10 (report of ADWR), p. 10; Tr. IX at 56 (Steve Erb).[25] The trial court found that the floodplain aquifer is "the only true geologic unit which is beneath and adjacent to the stream". Pet. App. B55. The materials of the floodplain aquifer were deposited by the stream and fill the channel in which the stream has moved back and forth over the years. *See Gila River IV*, 9 P.3d at 1073 n.2; Ex. 10 at 53; Ex. 1 at 15; D.N. 2341 at 5-6; Tr. III at 66-67 (Allen Gookin). Even the edge of the unduly narrow

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[23] 4 P.2d at 381. *Southwest Cotton* noted with approval that in *City of Los Angeles v. Pomeroy*, 57 P. 585 (Cal. 1899), all underground waters flowing through a pass or outlet "about two miles wide" were found to constitute subflow. *Id.* According to *Southwest Cotton*, the conclusion in *Pomeroy* that the subflow zone was two miles wide "adhered to" the definitions and tests for subflow, including the adjacency requirement. *Id.*

[24] *Southwest Cotton* noted that the valley at issue in *Pomeroy* is "about twelve miles wide" and that the width of the river bottom is less than one-quarter of a mile. 4 P.2d at 381.

[25] All citations in this brief to exhibits, transcripts and court clerk docket numbers are to the record from the evidentiary hearing conducted by the trial court.

subflow zone proposed by petitioners is, in places, thousands of feet from the existing stream. *See* Ex. 91.

The core of the holding in *Southwest Cotton* is the following test that the court articulated for determining whether a well is pumping subflow:

> Does drawing off the subsurface water tend to diminish appreciably and directly the flow of the surface stream? If it does, it is subflow. . . .

4 P.2d at 380. In *Gila River II*, the court recognized that "[i]f the extent of depletion is measurable, it is appreciable." 857 P.2d at 1245. Equating "appreciable" with "measurable" is consistent with dictionary definitions when *Southwest Cotton* was decided in 1931.[26] Petitioners do not dispute that pumping water from the saturated floodplain Holocene alluvium directly causes a measurable diminution of stream flow.

The very purpose of the concept of subflow is "to protect appropriable surface water rights against interference caused by the pumping of groundwater." *Gila River IV*, 9 P.3d at 1074. Nothing in *Southwest Cotton* or any other Arizona case or statute gives well owners a license to pump appropriable water – stream flow or subflow – without a valid appropriative right to do so.[27] No Arizona case or statute can fairly be interpreted as favoring

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[26] According to *Webster's New International Dictionary* (1930), "appreciable" meant "[c]apable of being appreciated or estimated; large or material enough to be estimated; perceptible."

[27] Since the 1800's, Arizona law has recognized that a senior appropriator is entitled to protection against measurable interference with its property right. *Austin v. Chandler*, 42 P. 483 (Ariz. 1895). In *Pima Farms Co. v. Proctor*, 245 P. 369 (Ariz. 1926), which was decided before *Southwest Cotton*, the Arizona Supreme Court affirmed a judgment against the defendant

groundwater over appropriable water. The losing parties in *Southwest Cotton* were well owners who unsuccessfully sought to enjoin upstream storage and diversion of the surface flows of the Agua Fria River. 4 P.2d at 372, 382. The Arizona Supreme Court plainly expressed a preference for appropriable water, referring to "the vastly more important surface [water] projects". *Id.* at 384. *Southwest Cotton* "effectively warned *all* Arizona water users that the law would *protect* surface water users *against groundwater pumping* that 'directly or appreciably' diminished surface flows." John D. Leshy & James Belanger, *Arizona Law Where Ground and Surface Water Meet*, 20 Ariz. St. L. J. 657, 690 (1988) (emphasis added).

> In effect, it has meant that *no* landowner in the state could have a *legitimate, legally protected expectation* of a right to pump groundwater regardless of its effect on surface streams.

Id. (emphasis added). The holding in *Gila River IV* regarding cones of depression is based squarely upon the decision on that subject in *Gila River II*, which in turn recognized that a cone of depression that extends into the subflow zone and depletes the stream is taking appropriable water. 857 P.2d at 1245. The trial court properly made a factual finding that historic pumping by wells located outside of the subflow zone has dried up certain streams in Arizona. *See* Pet. App. B34, B60.

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pumper, explaining that an "appropriator of water from a running stream is entitled to have it flow . . . to his point of diversion undiminished in quantity". *Id.* at 372. Arizona statutes also reflect that senior appropriators are entitled to protection against any measurable interference with their rights. *See* A.R.S. §§ 45-112, 45-151.A, 45-153.A, 45-175.

B. The Decision Below Does Not Transform Groundwater into Appropriable Water

Contrary to petitioners' accusation, nothing in the decision below "transform[s] . . . percolating groundwater into subflow" (Petition at 12). No previous Arizona case had purported to determine the boundaries of the subflow zone. No underground water that constitutes subflow previously constituted percolating groundwater. Its legal status had simply not yet been determined because the specific criteria necessary for doing so had not been fully developed and applied. Conversely, in the pending adjudication the Arizona Supreme Court has addressed only appropriable water, including subflow, and has not changed the legal status of any underground water that is not appropriable. 9 P.3d at 1083. In accordance with the directive given in *Gila River II*, the trial court "established[ed] an evidentiary and principled basis for *differentiating* appropriable subflow from percolating groundwater". *Id.* (emphasis added). Thus, no underground water that was percolating groundwater has been transformed into subflow.

C. The Statement in the Opinion Below Regarding an Absence of Property Rights in Groundwater Merely Reaffirmed Previous Opinions and Did Not Effect a Taking

Equally baseless is the assertion by petitioners and ASARCO that *Gila River IV* has taken their property by stating that landowners have no legally recognized property right in potential, future groundwater use. In the first place, the challenged statement is merely a quotation from *Gila River I*, which was decided eight years earlier and in turn paraphrased a holding in *Town of Chino Valley*

v. City of Prescott, 638 P.2d 1324, 1328 (Ariz. 1981) ("*Chino Valley II*"), *dismissed for want of substantial federal question*, 457 U.S. 1101 (1982). By merely repeating with approval statements made in previous cases, *Gila River IV* did not change prior law, much less "radically and suddenly" depart from established law (Petition at 9).

The argument made in the Petition that landowners have a vested property right in future groundwater use has repeatedly been rejected in decisions by both Arizona and federal courts that this Court has previously declined to review. Twenty years ago, the Arizona Supreme Court decided in *Chino Valley II* that contrary to *dictum* contained in certain previous cases, "there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply" and the right of the owner of the overlying land "is simply to the usufruct of the water." 638 P.2d at 1328. "Like wild animals free to roam as they please," percolating groundwater, "because of its migratory character," is "the property of no one." *Id.* Percolating groundwater need not "be acquired by eminent domain." *Id.* at 1329. In rejecting a challenge to the constitutionality of the Groundwater Management Act of 1980, *Chino Valley II* held that the enactment of the statute did not entitle landowners to "be paid compensation for any possible diminution of their rights which they may have had under the doctrine of reasonable use." 638 P.2d at 1330. The decision of the Arizona Supreme Court in *Chino Valley II* was appealed to this Court, which "dismissed for want of a substantial federal question." 457 U.S. at 1101.[28]

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[28] Twenty-five years earlier, the Arizona Supreme Court held that the Groundwater Code of 1948, which precluded

Landowners also unsuccessfully challenged the 1980 statute in federal court. In *Cherry v. Steiner*, 543 F.Supp. 1270 (D. Ariz. 1982), *affirmed*, 716 F.2d 687 (9th Cir. 1983), *cert. denied*, 466 U.S. 931 (1984), the district court rejected the landowners' taking claim. Citing *Erie*, the district court accepted the Arizona Supreme Court's determination in *Chino Valley II* that a landowner "has no [proprietary or property] interest in underlying groundwater prior to its capture." 543 F.Supp. at 1277. The foregoing quotation from the district court's opinion is directly contrary to the baseless assertion in the petition (at 21-22) that *Chino Valley II* does not stand for the proposition that a landowner has no legally recognized property right in potential, future groundwater use. The district court also rejected the landowners' allegation that *Chino Valley II* itself unconstitutionally destroyed property rights by working a radical and unpredictable change in state law. *Id.* Prior Arizona law "regarding groundwater as private property was not as clear" as plaintiffs alleged. *Id.* Further, because groundwater knows no boundaries, it "would be impossible to accord to each overlying landowner the right to the underlying, percolating water". *Id.* at 1278.

The decision of the district court in *Cherry v. Steiner* was affirmed by the Ninth Circuit Court of Appeals, which agreed that "*Chino Valley II* was not a 'startling' and 'unpredictable' change in Arizona property law, if it represents any change at all." 716 F.2d at 692. This Court denied a petition for a writ of certiorari. 466 U.S. 931. The

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pumping of groundwater to expand agricultural irrigation in critical areas, did not take property without compensation. *Southwest Engineering Co. v. Ernst*, 291 P.2d 764 (Ariz. 1955).

present petition inexplicably ignores the *Cherry v. Steiner* opinions. This Court, however, "rarely" reviews or rejects " 'a construction of state law agreed upon by the two lower federal courts,' " *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000) (quoting *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383, 395 (1988)), and "pay[s] great deference" to such views, *Hillsborough Township v. Cromwell*, 326 U.S. 620, 630 (1946).

Petitioners and ASARCO are incorrect in suggesting that the Groundwater Code supposedly created vested property rights to pump groundwater in the future that allegedly have been taken by *Gila River IV*. Whatever "rights" landowners may have under Arizona law to pump groundwater have not been affected by *Gila River IV*, which merely approved and clarified the means of distinguishing groundwater from subflow. Pumping of groundwater continues to be governed by the Groundwater Code or the doctrine of reasonable use. *Gila River IV* "did not change existing law concerning subflow or otherwise improperly encroach on the state's Groundwater Code," 9 P.3d at 1083, ¶45, or on the doctrine of reasonable use. Further, the Code itself makes clear that it provides no basis for authorizing groundwater pumping to interfere with rights to subflow or other appropriable water:

> This chapter [the Groundwater Code] shall not be construed to affect decreed or appropriative water rights. Nothing in this chapter shall be construed to affect the definition of surface water in § 45-101 and the definition of water subject to appropriation in § 45-141. . . .

A.R.S. § 45-451.B.

Finally, as discussed above, the record contains no indication that *Gila River IV* has limited pumping of

groundwater by petitioners or will do so in the future, much less that Arizona courts have precluded petitioners from making productive use of their land. Regardless of their alleged property interest in groundwater, petitioners have failed to prove that it has been taken by the Arizona Supreme Court.

CONCLUSION

For the reasons discussed above, the petition should be denied.

Respectfully submitted,

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